SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 363.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

NATIONAL MEDIATION BOARD, et al., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

OPPOSITION OF RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

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QUESTIONS PRESENTED.

1. Whether a Federal District Court has jurisdiction or statutory authority to issue a preliminary injunction prohibiting the National Mediation Board from conducting elections to resolve long-standing representation disputes under the Railway Labor Act on the ground that the Board is improperly requiring the incumbent union either to appear on the ballot or abandon its representation claim.

2. Whether the National Mediation Board, by denying objections to a previous election at Pan American and ordering another election because of confusion, uncertainty and alleged fraud in the previous election, so abused its discretion or so disregarded the provisions of the Railway Labor Act as to justify judicial intervention through an injunction procedure.

STATEMENT OF CASE.

The statement of the case set forth in the petition herein neither crystallizes the legal issues in question nor states all the relevant facts.

The issue at bar is not whether the Teamsters or any other union is entitled to represent certain employees of Pan American and Braniff; the only question presented in this case is whether the National Mediation Board may conduct an election in which all interested unions must declare their positions and participate in the voting process in a manner which will avoid further confusion and industrial unrest. The challenged holding does not determine who shall represent the employees involved, but merely whether an agency may exercise some discretion and flexibility in its election procedures in order to bring a final determination to a 30-day investigation which has been stretched into a three year gauntlet of confusion and procrastination.

The facts omitted from the petition demonstrate the basis for the NMB's decision to take the position of which petitioner complains. These are:

1. The incident of the forged letters upon which the Brotherhood of Railway and Airline Clerks (Clerks) placed reliance in their objections to the second election in Pan American occurred two years ago in August, 1966. Hence the effects thereof had been fully dissipated. Moreover, at the same time, the carrier Pan American also sent a letter to all the clerical employees involved in the election stating that if they desired the Clerks to continue as their bargaining representative they should so signify on the ballot (R. 205). Thus, it is impossible to determine which letters caused confusion in the first election in which the Clerks had declined to remain on the ballot.

2. The forged letters were circulated by unknown persons. The Teamsters represented to each of the courts involved in the legal proceedings below that they had no responsibility for the forged letters and invited an investigation by the Criminal Division of the Department of Justice. That Division, after many months of investigation, advised the National Mediation Board that it had "concluded against criminal prosecution" (R. 77).

In addition, Teamsters, on January 2, 1968, filed an affidavit sworn to by Mr. Henry J. Breen, the Director of the Teamsters Airline Division and the individual solely in charge of the Pan American election campaign, stating that he had conducted an investigation to determine whether anyone in such Division or otherwise connected with or sponsored by the Teamsters had been responsible for the transmission of the fraudulent letters, and had been unable to find any such responsibility (R. 202). Neither the NMB nor any court at any time found that the Teamsters union was responsible for the letters.

In the second election only 137 votes out of a total of 3517 cast were write-in ballots for the Clerks. In ordering a third election because of the confusion and uncertainty created *inter alia* by the refusal of the Clerks to appear on the ballot, the Board found that "none of the objections [of either union] were of sufficient merit to justify the determination to sustain or dismiss the results of the election held" (R. 26).

3. The long delay (over three years) since the filing by the Teamsters of an application with the Board to investigate the representation dispute at Pan American, then accompanied by a 51% card authorization showing of interest, has resulted in considerable and increasing labor unrest. The clerical employees of Pan American have been unable to obtain the same benefits of collective bargaining that have been obtained by their fellow workers

in other crafts (R. 202-204). See also amicus intervention in court below of Pan American urging an immediate election because of work interruptions and disruption occasioned by the delay in resolution of the dispute over representation (Appendix F of Motion of Teamsters to Vacate Stay, filed with this Court on July 15, 1968). See also decision of the U. S. District Court for the Southern District of New York in *Pan American World Airways, Inc. v. IBT*, 275 F. Supp. 986 (S. D. N. Y. 1967), in which the court enjoined the Clerks from striking to obtain a collective bargaining agreement until after the representation dispute was resolved by the Board and in which the Court deplored the long delay.

REASONS FOR DENIAL OF WRIT.

This case is not one in which the intervention of this Court is warranted under Rule 19. As will be seen, the actual holding herein is not in conflict but rather in agreement with the applicable decisions of this Court and of the federal courts of appeal, and involves no new or unchartered area of application of federal law. The Court of Appeals below, far from sanctioning a departure from an accepted and usual course of judicial proceedings, has required the District Court in this case to follow prevailing judicial precedents.

I.

The principal complaint of the petitioner is that the court below, by permitting judicial review of the National Mediation Board's determinations only in instances of "gross violation of the statute", i. e., the Railway Labor Act, has added an additional dimension to reviewability. Whatever the descriptive term used by the court below by way of dictum and emphasis, the actual holding is restricted to what the facts of this case which show no violation of the statute, gross, plain or otherwise.

The Board's duty under the Railway Labor Act to resolve disputes between unions over representation rights

is simply "to investigate such dispute and certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."—Railway Labor Act, Sec. 2. Ninth.

The Board has been investigating the present dispute not for thirty days but for over three years with no resolution yet in prospect because of the successive legal procedures invoked by the Clerks, all contrary to the mandate of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, that "there was to be no dragging out of the controversy into other tribunals of law." As the court below stated in another case in which there was an attempt to interfere with the investigation functions of the National Mediation Board by court action:

> "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence in the effort to maintain enough harmony to prevent interruption of service. *Congress sought to preclude litigation in the courts* over what the Supreme Court has called an 'explosive problem'." *WES Chapter Flight Engineers International v. National Mediation Board*, 114 U. S. App. D. C. 229, at 231, 314 F. 2d 232, at 326. (Emphasis supplied.)

This Court has indicated in *Switchmen's Union* and *Employees Association*,* that only flagrant abuse of the Board's discretion or clear failure to follow express provisions of the Railway Labor Act can justify court interference.

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* *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650.

II.

Two elections have already been held in Pan American Airways. The Board's agents conducting the last election had found that the Teamsters should have been certified as the bargaining representative, but the Board concluded that conditions of confusion and uncertainty which still existed at that time made it unnecessary to definitely resolve objections filed by both the Teamsters and the Clerks. The Court observed, however, that the objections were without merit. The Board found the confusion was caused not only by the uncertainty of the employees as to whether they could vote for the Clerks but also by the fact that the Clerks had refused to have their name placed on the ballot. Accordingly, it directed that each union be required either to appear on the ballot or abandon its claim to representation rights.

Nothing in the Railway Labor Act prevents the Board from adopting such a rule. Although Section 2, Ninth of the Act, does not require the Board to use the election process to ascertain the choice of a bargaining representative, when the election process is utilized, the Board is authorized, also under Section 2, Ninth, to establish its own rules to govern the election and to designate its own form of ballot and who is to appear on it. See *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650, where at 671 this Court held:

> "The Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board."

In the same case at 669 this Court stated: • • • "the details of selecting respresentatives were to be left for the final determination of the Board . . .",

Nor can such a requirement be deemed unreasonable or arbitrary. On the contrary, in view of the confusion that has plagued the two previous elections because at least

some of the employees did not know how to express their choice, it would seem that the Board's requirement is not only reasonable but necessary.

III.

The Clerks' argument that the 137 write-in votes for the Clerks were induced by fraud and thus should be discounted so that the Teamsters' application would have to be dismissed is clearly without merit.

1. Such a contention of fraud is necessarily speculative and incapable of proof. These 137 write-in votes for the Clerks received from among the 6,936 employees eligible to vote in the election might very well have been induced by Pan American's letter to its employees during the first election requesting them to vote for the Clerks by so marking their ballots (R. 205), or by the enthusiasm of the Clerks' own members. In any event the Clerks had ample opportunity to correct any confusion before the ballots on the second election were mailed and it was their duty to do so. See *Linn v. United Plant Guard Workers*, 393 U. S. 53.

2. Fraud or no fraud, the 137 ballots in question were not counted for the Teamsters in determining its majority and at least indicate the desire of those so voting for representation by some union. That is all that is required under the decision of the court below in *Aeronautical Radio v. National Mediation Board*, 380 F. 2d 624, cert. den. 389 U. S. 912. See also *Railway Clerks v. Employees Ass'n.*, 380 U. S. 650.

3. Even if the 137 ballots were mistakenly cast because of "fraud", this would only have required the holding of a new election, not dismissal of the entire case.

IV.

The Clerks next argue that a number of the mail ballots were returned without postmarks and therefore should be disregarded and the Teamsters' application dismissed. The first answer to this contention is that even if the postmark were deemed necessary by technical Post Office regulations, it was not the fault of any party to this proceeding that the postmarks did not appear on some of the ballot envelopes which were returned. It is undenied that the ballots, whether postmarked or not, were at all times in the possession and custody of either the Post Office Department or the National Mediation Board. There is not a scintilla of evidence nor even a contention that any of the parties to the proceedings before the Board in any way tampered with these ballots. Certainly the purposes of the Act, as well as the interests of justice, would require that if any significance is to be attached to a lack of postmark, a new election should be held, not that the entire proceedings be dismissed and the employees left with no bargaining representative at all. However, no Board rule requires a postmark and the Board has determined that the absence of a postmark on certain envelopes is not cause for disallowance of such ballots. It is not unusual for bulk mail, especially during the Christmas season, to be delivered without a postmark. Certainly it is for the Board and not the courts to determine whether such ballots should be counted or not counted, absent anything in the Railway Labor Act to the contrary.

V.

The Clerks next argue that a number of write-in ballots were cast for the Transport Workers Union, who, under the no-raid provision of the AFL-CIO Constitution, could not challenge the Clerks in an election, and that therefore these votes should be discarded, leaving the

Teamsters with less than the required majority. The Teamsters are not a party to this no-raid provision, but even if they were, this private arrangement could not operate to prevent the Board from fulfilling its statutory duty to investigate representation disputes. Furthermore, it would be one thing if the TWU affirmatively sought certification from the Board against the Clerks (*United Textile Workers of America v. Textile Workers Union of America,* 258 F. 2d 743; *International Brotherhood of Firemen and Oilers v. International Association of Machinists,* 338 F. 2d 176), but it is quite another thing for the Board to give significance to the TWU's write-ins solely for the purpose of determining that the majority of the employees eligible to vote wanted to be represented by at least some union. This was the only reliance placed upon the TWU ballots by the Board. If the Teamsters' application were dismissed as requested by the Clerks, it would be a patent injustice to the Pan American employees involved, for it would to foreclose them from an opportunity to select any bargaining representative when it is obvious from this entire case that a vast majority of the employees do not wish to be without representation.

VI.

The Clerks' final argument is that changes since 1965 in the composition of the employees in the election unit destroy the 51% showing of interest required under the Board's rules. The Board has found the dispute a continuing one and there is nothing in the Railway Labor Act which imposes any time limit on showing of interest. It hardly behooves the Clerks, who by their litigation have endlessly prolonged this dispute, to assert an abuse of discretion.

CONCLUSION.

All the Clerks' contentions are fully answered in the opinion of the court below which found that there was neither an abuse of the Board's discretion nor a violation of the Railway Labor Act involved in the Board's decision to hold a third election. The Board's Decision, Findings and Order in respect to the objections to the second election and the reasons for directing another reflect its careful consideration of all the issues raised and the need for a third election (R. 18, 26). It is obvious from the record in this case that the employees of Pan American, as well as Braniff, want some union to represent them, and they should be given the opportunity to express their choice without further judicial proceedings and without further "dragging out of the controversy into other tribunals of law".

It is respectfully submitted that the petition herein should be denied.

Respectfully submitted,

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